PRACE NAUKOWE UNIWERSYTETU EKONOMICZNEGO WE WROCŁAWIU
RESEARCH PAPERS OF WROCLAW UNIVERSITY OF ECONOMICS AND BUSINESS

2019, vol. 63, nr 9

ISSN 1899-3192
e-ISSN 2392-0041

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CRITICAL ASSESSMENT OF THE TIE-BREAKER RULE USING THE EXAMPLE OF THE DTT GERMANY–POLAND

KRYTYCZNA OCENA *TIE-BREAKER RULE* NA PRZYKŁADZIE UMOWY O UNIKANIU PODWÓJNEGO OPODATKOWANIA ZAWARTEJ POMIĘDZY POLSKĄ A NIEMCAMI

DOI: 10.15611/pn.2019.9.04
JEL Classification: F390, K330, K340

Summary: Taxpayers establishing their economic and personal interests in more than one country run the risk of becoming a tax resident in more than one tax jurisdiction. The problem of possible double residency shall be solved by Article 4(2) and (3) (the so-called Tie-Breaker Rule) of the OECD Model Tax Convention. Both articles are falling back on national legal definitions, which raises the risk of their different interpretation by the participating countries. The aim of the study is to demonstrate the differences in interpretation of such terms as "resident", "permanent home", "centre of vital interests" and "habitual abode" in Poland and Germany. The authors also try to find out whether and how the consistency of the decision-making process can possibly be achieved. The analysis shows that it can be supported by the efficient and effective information exchange processes as well as increased international cooperation between the tax administrations and the administrative courts. As a research tool the authors used an analysis of subject-matter literature, legal acts, and court decisions.

Keywords: tie-breaker rules, double taxation treaty, tax residency, BEPS.

Streszczenie: Podatnicy prowadzący swoje sprawy biznesowe i prywatne w kilku państwach równocześnie ponoszą ryzyko zyskania rezydencji podatkowej w więcej niż jednej jurysdykcji podatkowej. Problem możliwej podwójnej rezydencji powinien być rozwiązany za pośrednictwem art. 4 ust. 2 oraz 3 Modelowej konwencji OECD (*tie-breaker rule*). Jako że wskazane artykuły odnoszą się do definicji zawartych w prawie krajowym, może to prowadzić do odmiennej interpretacji ze strony poszczególnych państw – stron umowy. Celem artykułu jest przedstawienie różnic w interpretacji takich pojęć, jak: rezydent podatkowy, stałe miejsce zamieszkania, centrum interesów życiowych oraz miesce zwykłego pobytu w Polsce i w Niemczech. Autorzy próbują również odpowiedzieć na pytanie, czy i w jaki sposób może zostać osiągnięta spójność decyzyjna w tym zakresie. Analiza wskazuje, że do jej osiągnięcia może przyczynić się wydajny i efektywny system wymiany informacji, jak również wzmożona współpraca międzynarodowa pomiędzy administracjami podatkowymi i sądami administracyjnymi stron umowy. Jako narzędzia badawcze wykorzystano analizę literatury przedmiotu, aktów prawnych oraz orzecznictwa.

Słowa kluczowe: *tie-breaker rule*, umowa o unikaniu podwójnego opodatkowania, rezydencja podatkowa, BEPS.

1. Introduction

The term "tax residence" is one of the most important components of the modern tax system. Determination of the place of residence, the subject of numerous papers (e.g. [Jamroży 2016; Sidorowicz 2016; Hahn 2012]), is of key importance for the scope of personal and corporate income taxation [Pioterczak 2007, p. 1]. In addition, a lot of papers are dealing with the interpretation of double taxation treaties by local tax authorities, administrative courts and administrative courts of appeal [Wojtuń 2015; Majdańska 2015; Szczygieł 2016; Perwein 2017]. However, very few papers deal with differences in interpretation of particular terms used in double taxation treaties in the Contracting States, even though the supposed lack of uniformity in the interpretation of such terms was highlighted in literature before [Hahn 2012]. For some authors, the solution lies in "common interpretation" [Sixdorf 2016, p. 795; Vogel, Lehner 2015, p. 116; Hahn 2012, p. 941]. Nonetheless, before applying it, the above-mentioned differences must be identified.

The term "tie-breaker rule" is used in common tax treaty provisions designed to prevent an individual from being treated as a resident for the purposes of the treaty, in both treaty countries [Bajson, Kret 2008, p. 1]. As of 2017, persons covered by double taxation treaties are listed in article 3(1) letter a) in connection with article 4(1) of the OECD Model Tax Convention (hereafter: OECD-MC).[1] The norm refers to national definitions of a person's domicile, permanent residence or place of management. When the conducted examination leads to the categorization of a person as a resident of both Contracting States, for natural persons further analysis

[1] OECD Model Tax Convention on Income and on Capital: Commentary (21 November 2017), Models IBFD.

is carried out based on other criteria, such as permanent residence, centre of vital interests, habitual residence or, finally, nationality. Apart from that, there is a separate paragraph used for determining the residence status of 'non-natural persons', for which the decisive criterion is the place of the actual management.

It should be noted that the tie-breaker-rule can be considered as an effective instrument for determining the tax residency only if the terms used in paragraphs 2 and 3 are interpreted uniformly by both Contracting States. Otherwise, without such a consistent interpretation[2] the result would be, as a rule, as incoherent as if one interpreted these terms in accordance with paragraph 1, which is based on a potentially non-identical criteria of the two Contracting States.

However, in the overall assessment of article 4 OECD-MC, a qualitative distinction between paragraph 1 and the remaining two paragraphs has to be made. While paragraph 1 is clearly based on national definitions ("... person who, under the laws of that state ..."), the terms used in other paragraphs (i.e. permanent residence, centre of vital interests, habitual residence, place of effective management) can only be interpreted in a treaty-autonomous and systematic way. Consequently, the structure of article 4 OECD-MC should enable the determination of residence in an unambiguous way. In many cases, this goal is actually achieved. The devil lies – as always – in the detail.

The aim of the study is to demonstrate the differences in interpretation of such terms as "resident", "permanent home", "centre of vital interests" and "habitual abode" between Poland and Germany. As a research tool, an analysis of subject matter literature, legal acts and jurisdiction of courts were used.

2. Natural person

2.1. The definition of 'resident'

The term "resident of a Contracting State" as used in article 4(1) of the German-Polish Double Taxation Treaty (hereinafter: DTT DE/PL) refers to a person who, under the law of that state, is taxable on the basis of his/her domicile, permanent residence, place of business or any other similar characteristic. This means the tax residence of the taxpayer is usually determined by domestic indicators [Jamroży 2016, p. 28].

Within the application of article 4 OECD-MC, all of the individual criteria are being progressively followed by each Contracting State until a clear decision can be made at one specific stage in favour of only one of the Contracting States. However, the practice of the DTT DE/PL shows that this finding can only partially be confirmed. Although the OECD has published a detailed commentary on the OECD-MC,

[2] The term is understood to mean the aspiration of the parties to interpret the wording of the double taxation treaty in the way it is accepted in the second country, see Lehner [in:] Vogel/Lehner, DBA, Grundlagen, par. 115.

the problem of the correct interpretation of the terms used in articles 2 and 3 does not exclusively concern the German and Polish judiciary [Perwein 2014, p. 184; 2017, p. 102] but also the specialist literature in both countries. Against this background, interpretation differences of some specific terms will be discussed in detail.

2.2. The definition of 'permanent home'

German case law, as well as German literature, use the same criteria (these are: permanent use,[3] sufficient use over a one-year horizon and the irrelevance of the form of the permanent home) based on which they deem a taxpayer to have a specific permanent home as their Polish counterparts. However, the German interpretation goes a few steps further. Firstly, a permanent home has to be the so-called "specially qualified residence",[4] which can be considered as such if the dwelling is suitably equipped as well as sufficiently big for a taxpayer living circumstances (qualitative minimum standard). Furthermore, the German understanding of the term requires also a subjective element of the taxpayer's personal commitment to the permanent home. These two additional aspects are absent from the Polish considerations. Moreover, the criterion of personal commitment is even clearly rejected by some Polish sources [Morawski 2008, p. 14].

As far as the criterion of permanent use is concerned, according to German case law, this criterion is fulfilled when the taxpayer spends about 50 days a year at the permanent home.[5] Neither the Polish tax ruling practice nor the literature clearly state what exactly is meant by the permanent or minimum level of use. The assessment whether this criterion has been fulfilled shall be based on a reasonable assessment in which account is taken of the overall picture of the taxpayer's living conditions.[6]

Finally, it can be stated that the interpretation of the term 'permanent home', although intended to be interpreted in an autonomous and coherent way by both Contracting States, differs between Poland and Germany.

2.3. Centre of vital interests

The centre of vital interests is defined by the DTT as the place to which the taxpayer's personal and economic relations are closer. On purely grammatical grounds, the centre of vital interests should be therefore deemed to be in the state to which the two relations are stronger cumulatively [Bajson, Kret 2008, p. 7].

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[3] DE: Federal Fiscal Court (Bundesfinanzhof, hereafter referred to as: BFH) the ruling of 16 Dec. 1998 (I R 40/97), Federal Tax Gazette (Bundessteuerblatt, hereafter referred to as: BStBl). II 1999, p. 207; BFH, 5 June 2007 (I R 22/06), BStBl. II 2007, p. 812; Pohl, Die ständige Wohnstätte, IWB 2013, p. 237.

[4] DE: BFH, 05 June 2007 (I R 22/06), BFH, 23 Oct. 1985 (I R 274/82), BStBl. II 1986, p. 133.

[5] DE: BFH, 16 Dec. 1998 (I R 40/97).

[6] PL: Provincial Administrative Court (Wojewódzki Sąd Administracyjny, hereafter referred to as: WSA) in Olsztyn, 20 Dec. 2016 (I SA/Ol 272/16); Supreme Administrative Court (Naczelny Sąd Administracyjny, hereafter referred to as: NSA), 16 April 2013 (II FSK 1658/11).

Nonetheless, the Polish literature on the subject does not interpret these conditions in such a strict manner. It is therefore considered sufficient if a taxable person has personal or economic relations with the Contracting State to fulfill the criterion. We also need to bear in mind that the interpretation of the term 'centre of vital interests' in Poland is strongly based on the national definition. This follows from the fact that the centre of vital interests is also a criterion for deciding upon the tax residence under national law.[7] According to article 3 (1a) of the Polish Income Tax Act, the place of residence is where "the personal or economic centre of the life interests is founded".

What is more, analysis of the Polish tax rulings leads to the conclusion that Polish tax authorities consider a person to have unlimited tax liability even though the person has closer personal and economic relations with another country. An example of this can be the tax ruling binding delivered by the Director of the Tax Chamber in Bydgoszcz.[8] In this case, a property in Poland owned by a natural person was taken as an indicator that this person had his/her habitual abode in Poland, even though he/she had been working in Argentina for three years and had no other personal or economic relations to Poland. Thus, it can be stated that any kind of economic relationships to Poland can be considered by the Polish tax authorities as a sufficient condition for the existence of a permanent home in this country.

The above presented interpretation, which relies strongly on national law, contradicts the opinion shared by the German jurisprudence and the OECD. The OECD states that the interpretation on grounds of the national understanding is permissible only if the term cannot be satisfactorily interpreted in the context of the Agreement. Apparently the Polish tax administration has taken a very selective approach to the OECD-MC, which again leads to differences in interpretation as well as legal uncertainty. Consequently, the interpretation preferred by the German jurisprudence and the interpretation of the Polish case law, can lead to completely different results [Anger, Wagemann 2014, p. 611].

2.4. The definition of "habitual abode"

The criterion of the habitual abode can only be considered if the centre of vital interests cannot be clearly determined. However, commentaries to the OECD-MC fail to provide any helpful interpretation of what exactly is meant by the term "habitual abode".

The opinion prevailing in Polish literature argues that the place of habitual abode, which, as a rule, is longer than 183 days in the tax year [Sidorowicz 2016, p. 14] is assumed to be in the state where the taxpayer predominantly resides. The position

[7] PL: Personal Income Tax Act, Law No. 1509 of 25 July 1991, Art. 3(1a)(1).

[8] PL: Director of the Tax Chamber (Dyrektor Izby Skarbowej, hereafter referred to as: DIS) in Bydgoszcz, the tax ruling of 4 Oct. 2011, (ITPB2/415–625/11/RS), repealed by WSA in Olsztyn, 29 March 2012, (I SA/Ol 47/12).

was also upheld by the Director of the Tax Chamber in Warsaw in his tax ruling binding of February 27, 2015.[9]

Similarly to Poland, the opinion prevailing in German literature argues that the place of habitual abode is in the state where the taxpayer predominantly resides. However, a minimum period of stay cannot be clearly established, since the assessment takes account of all stays taken together, which can be then used to identify the state in which the habitual abode is located.[10]

Next, the effectiveness of the tie-breaker rule in the context of limited access to information, especially in terms of the number of days spent in a state, has to be examined. Since the EU borders are basically open because of the freedom of movement, it is difficult to verify whether the number of days spent in a specific country as declared by the taxpayer is true. In this respect it seems to be reasonable to develop a uniform methodology of registering taxpayers' presence in a given country.

2.5. National status and mutual agreement

If it is not possible to determine the country of tax residence based on the above mentioned determinants, residence should be determined on the basis of nationality. If this fails too, a mutual agreement between the competent authorities of the Contracting States has to be reached to ensure that the taxation will be carried out in a way that would not contradict the DTT rules. Although the competent authorities of the Contracting States should seek to resolve any difficulties by mutual agreement, they are not obliged to come to an understanding.

3. Non-natural persons

Similar objections as in the case of natural persons can also be encountered when determining the tax residence status of non-natural persons, in particular in context of the term "place of effective management". The reason for this is the fact that the term is undefined and subject to varying interpretations [Sanghavi 2016, p. 520].

However, the interpretation of the term "place of effective management", which is codified in article 4(3) DTT DE / PL, is congruent in many aspects, both in Polish and in German terms. Nevertheless, there is a far-reaching problem concerning the question of which type of executive tasks should be considered as "effective management". In Poland, no settled case-law or standard literature opinion has developed as to this question yet. On the one hand, Polish jurisprudence[11] and a minority opinion expressed in the subject matter literature [Banach 1999, p. 17] state that the place of effective management equals the place where all ordinary,

[9] PL: DIS in Warszawa, tax ruling of 27 Feb. 2015 (IPPB4/415-936/14-4/JK).

[10] See: Wassermeyer/Kaeser, in: Wassermeyer, DBA, art. 4, par. 76.

[11] PL: NSA, 18 Nov. 2016 (II FSK 2822/14).

everyday decisions are being made. On the other hand, Polish administrative courts,[12] as well as many of authors of Polish professional literature[13] have repeatedly stated that that the place of effective management is the place where the final far-reaching strategic decisions are made. Even the Polish tax authorities have stated in one of their tax rulings[14] that two competing opinions have emerged in Polish literature on the subject and none of them clearly prevails. Thus it cannot be conclusively decided whether the place of effective management is judged by the Polish tax authorities against operational or strategic decisions. Nevertheless, a clear tendency[15] for the adoption of the second alternative can be observed.

In contrast, the German judiciary, both in its settled case law[16] as well as in literature,[17] deems the criteria laid down in § 10 of the German Tax Code applicable to the interpretation of the term "effective management". Although the term is intended to be derived from the context of the Treaty as such (autonomous interpretation), in the end there are no substantial differences between § 10 of the German Tax Code and article 4 Nr. 24 of the OECD-MC commentary (which explains the concept of the location of the effective management). According to the settled case-law in Germany, the place of effective management is where the everyday, operational decisions are taken (more specifically: the concern for the lawful conduct of the company in external relations, the establishment of the business organization, the development of short-term plans, the execution of daily business).[18] This is evident in the interpretations based on the Treaty as well as on the national law. Using strategic decisions as a criterion for identifying the place of effective management is even clearly denied in the German approach.

This allows to draw a parallel to the results in the previous section. Due to the different interpretation of the same legal term by the German and Polish tax authorities, some distortions in the correct and effective application of the DTT DE/PL may emerge. If the strategic decisions of a German company were made in Germany, and the operational ones in Poland, the withheld tax would be collected in both Contracting States. Assuming that the Polish judicature uses the new OECD-MC commentary as a basis for interpretation, in which effective management is only one out of many factors under consideration, further differences in interpretation between the German and Polish tax authorities may emerge. This results from the

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[12] PL: WSA Gdańsk, 21 Nov. 2007 (I SA/Gd 65/07); NSA, 18 Nov. 2016 (II FSK 2475/14).

[13] See: Fiszer/Biegalski, Zapobieżenie podwójnemu opodatkowaniu, Prawo i Podatki 4/2008, pp. 2-33; Guzek, in: DBA DE/PL, 2007, p. 41; Banach, Polskie umowy o upo., 2002, p. 117; Jamroży/Cloer, Umowa o unikaniu podwójnego opodatkowania z Niemcami, art. 4, par. 25.

[14] PL: DIS in Warszawa, 7 Nov. 2013 (IPPB5/423-647/13-2/PS).

[15] Based on the number of judgements on the matter.

[16] DE: BFH, 07 Dec. 1994 (I K 1/93), BStBl. II 1995, p. 195; BFH, 23 Jan.1991, (I R 22/90), BStBl. II 1991, p. 554;

[17] See: Pohl, [in:] Schönfeld/Ditz, DBA, art. 4, par. 106.

[18] See: Wassermeyer/Kaeser, [in:] Wassermeyer, DBA, art. 4, par. 97.

fact that the Polish jurisprudence takes a dynamic [Majdańska 2015, p. 22] and the German a static [Anger, Wagemann 2014, p. 611] approach.

However, conflicts regarding a clear determination of the residence status of legal persons should be definitively solved with the new OECD-MC 2017. According to it, the tax authorities of both Contracting States should always resolve the conflicts of residence by way of a mutual agreement procedure [Polatzky, Balliet, Steinau 2017, p. 226].

4. German vs. Polish interpretation

What follows from the above considerations is an indication that individual terms are interpreted differently in Germany and Poland. While German jurisprudence favours the static interpretation, Polish administrative courts follow the dynamic interpretation without making reference to a concrete version of the OECD-MC. In order to be able to ensure decision-making harmony, the Polish tax authorities and case law rely on the OECD-MC only without going in-depth into the foreign jurisprudence [Morawski 2010, p. 6]. In contrast to that, in the BFH case law the decision-making harmony and thus the use of foreign legal sources as an additional aid to interpretation, has recently gained in importance.[19] As far as the German [Vogel, Lehner 2015, par. 116] and Polish [Morawski 2010, p. 6] literature are concerned, they agree that a basic understanding of the foreign legal system, whose law is included in the DBA interpretation, is a useful aid to interpretation. However, as long as the Polish administrative courts will not consider foreign case law, it is doubtful to reach decision-making harmony.

There is also no agreement as to when national law may be used in the application of Article 3 (2) OECD-MA. According to the view of the OECD [Anger, Wagemann 2014, p. 611], an interpretation based on the national understanding of the Contracting States is only possible if the term cannot be possibly interpreted based on the context of the agreement. Therefore the interpretation from the context of the agreement has been given a wide space, so that recourse to national law could only be seen as the last possible step in the interpretation of the concept. Those proposing the national interpretation approach argue, however, that national law should in principle take precedence over an autonomous agreement. The BFH case law shows a clear shift towards international law theory, which prefers a deal-autonomous interpretation.[20] By contrast, Polish administrative courts apply individual terms having recourse to the domestic law.[21] As a result, in practice German and Polish courts can come to completely different decisions.

[19] DE: BFH, 2 Sept 2009 (I R 111/08), BFH, 2 Sept 2009 (I R 90/08).

[20] DE: BFH, 30 May 1990 (I R 179/86).

[21] PL: NSA, 22 Sept 2010 (II FSK 691/09).

Furthermore, differences in interpretation resulting from the most commonly used sources and methods are discussed. Such peculiarities may arise, for example, from the historical origin of the legal system as well as from its specific way of reasoning [Sixdorf 2016, p. 795]. Thus it can be stated that the Polish administrative courts, in general, only sporadically use international treaties to interpret national norms and terms as auxiliary support, although based on Art. 32 VCLT[22] a reference to these sources is possible.[23] The reason for this is the Polish legal tradition, which prefers a grammatical interpretation of domestic legal norms. The same methodology is applied to international treaties, although the method is anchored in Art. 31 (1) VCLT[24] Nonetheless, it should be noted that the trend has changed in the case law of the Polish Supreme Administrative Court (PL abbr. NSA) in recent years. However, a clear trend in this regard has not emerged yet [Morawski 2010, p. 6].

The problem of the potential differences of interpretation which may arise when interpreting the term intended for the identification of the legal status of legal entities (Article 4 (3) OECD-MA) would hinder the implementation of the Multilateral Instrument (MLI)[25] in the modified OECD-MA 2017. Art. 4 MLI provides that tax administrations involved must, in cases of doubt, seek agreement on the place of effective management by means of a mutual agreement procedure. However, the MLI provides no guarantee that a taxpayer's dual residence would be resolved, as it is possible that the competent authorities are unable to reach an agreement. What is more, if a mutual agreement cannot be reached, a double-resident legal entity will in principle be denied all agreement advantages [Reimer 2017, p. 1]. As in the case of Art. 25 OECD-MA (natural persons), tax administrations are therefore not obliged to reach an understanding. Ultimately, it can be stated that the differences in interpretation are not solved by the application of the MLI. Since the regulation in the existing DBA DE/PL is not implemented, it does not apply to the German-Polish case anyway.

5. Conclusions

Double taxation conflicts result regularly from the different interpretation or application of concepts defined in double taxation treaties, from the specific application of the domestic rights or the different approach to the legal interpretation in both Contracting States. Thus, the objectives of a DTT – avoidance of double taxation and double non-taxation – can only be achieved if its users in both states interpret the terms or groups of concepts used in the DTT as synonymous. If double

[22] Vienna Convention on the Law of Treaties, 1969, signed in Vienna on 23 May 1969.

[23] See: [Filipczyk 2013].

[24] See: Avery Jones in Lang, Tax Treaty Interpretation, 2001, 362 f.; Avery Jones in IFA, CDFI LXXVIIIa, 1993, 604.

[25] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting of 7 June 2017, OECD.

taxation and double non-taxation result from the different interpretation of the terms and rules used in the DTT in both Contracting States, they can only be avoided if one Contracting State in a bilateral relationship follows the interpretation of the other state. An agreement in terms of harmonious interpretation thus results as a consequence of the teleological interpretation of DTT.

Thus a consistent and correspondingly efficient interpretation of the agreement is only possible through reciprocity in the interpretation of a term or group of concepts of the DTT. This would reduce the likelihood of avoiding conflicts and thus reduce the likelihood of double taxation or double non-taxation. Although the sources of the other Contracting State cannot bind courts, they can, as a source of legal knowledge, promote the uniform interpretation of the DTT in both Contracting States. This can be achieved through the efficient and effective information exchange referred to in the BEPS Action Plan, as well as increased international cooperation and coordination between tax administrations and the administrative courts.

Moreover, harmonization of the DTT interpretation should be significantly accelerated by the international prejudicial procedure of a permanent body. The binding effect for both Contracting States should not only make a powerful contribution to the avoidance of double taxation, but also harmonize the interpretation of the individual double taxation agreements.

Lastly, it can be stated that a fundamental understanding of the foreign legal system whose law is included in the interpretation of the DTT is indispensable. The reciprocity in the interpretation of the individual terms of the DTT can then make a significant contribution to legal certainty, also in the context of the tie-breaker rule.

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